WONG HA ING v. GRAND COLADA SDN BHD & ORS AND ANOTHER CASE

HIGH COURT SABAH & SARAWAK, BINTULU
LEE HENG CHEONG J
[CIVIL APPEALS NO: BTU-12BNCvC-1/10-2015 & BTU-12B-4/10-2015]
13 FEBRUARY 2017

TORT: *Trespass – Trespass to land – Proprietor of strata title of land and building entered into tenancy agreement with tenant – Tenant expressly agreed not to underlet parcel without prior consent of proprietor – Tenant assigned or sublet parcel to others doing franchise business – Whether mesne profits against tenant should be jointly awarded with other defendants*

The appellant ('the plaintiff') was the registered proprietor of a strata title of a land and building ('the parcel'). He entered into a written tenancy agreement with his tenant ('the first defendant') for a term of five years commencing from 1 June 2002 to 31 May 2007 at an agreed monthly rent in the sum of RM4,800 ('the tenancy agreement'). Clause 2(i) of the tenancy agreement expressly stipulated that the first defendant agreed not to underlet the parcel without prior consent of the plaintiff. However, after the expiry of the tenancy agreement, the first defendant continued to occupy the parcel and later, without any consent or notice of the plaintiff, assigned or sublet the said parcel to the second respondent ('second defendant') but operated by the third respondent ('the third defendant') doing the franchise business of the fourth respondent ('the fourth defendant'). The plaintiff, therefore, brought an action at the Sessions Court. The Sessions Court granted against the first defendant (i) arrears of rent under the tenancy agreement from 1 June 2002 to 31 May 2007; and (ii) mesne profits from 1 June 2007 to 15 October 2007 but there was no award of mesne profits against the first defendant who parted the said parcel to other defendants from 16 October 2007 till 11 August 2012. The Sessions Court also gave judgment against the second defendant only, ordering payment of rental of RM4,800 per month from 16 October 2008 till 11 August 2012. Hence, the appeal by the plaintiff and the second defendant. The plaintiff prayed for mesne profits to be awarded against the first defendant from 1 June 2007, not July 2007, to 15 October 2008 and also mesne profits against the first defendant jointly with all the other defendants since 16 October 2008 till 11 August 2012.

Held (allowing plaintiff's appeal; dismissing second defendant's appeal):

(1) The plaintiff had proven on a balance of probabilities that the defendants and each of them had dispossessed, parted with the possession of, and/or in wrongful or illegal possession without consent or notice of the plaintiff, being the registered proprietor, in respect of the said parcel after the expiry of the said tenancy agreement. (para 15)

(2) The first defendant should not have parted with the possession of the said parcel by selling, assigning or sub-letting to the second defendant as it was clearly in breach of the terms of the tenancy agreement. The second, third and fourth defendants ought to have ascertained that the first defendant had the requisite authority to sell before proceeding with the sale, assignment or sublet of the said parcel. Failure to do so would make their possession and occupation of the same unlawful, wrongful and illegal. (para 16)

(3) The defendants were trespassers on the said parcel as they had dispossessed, parted with the possession of, and/or were in wrongful or unauthorised occupation since the second, third and fourth defendants took over the said parcel from the first defendant since 16 October 2008 without consent or notice of the plaintiff. Being the registered proprietor of the parcel, the plaintiff had indefeasible title which could not be rendered defeasible by virtue of any wrongful selling, assignment or sub-letting of the said parcel by the first defendant to the second and other defendants. (paras 17 & 18)

(4) The defendants' unlawful possession of the parcel was since 1 June 2007 and remained at all times unlawful as there was no tenancy agreement or contract between any of these defendants and the plaintiff. Therefore, mesne profits ought to be awarded against all the defendants, jointly and severally. The damages in the form of mesne profits are assessed on the basis of the value of the premises at the relevant time, that is to say, at the time the judgment was pronounced in the court below. (paras 20-21)

(5) The Sessions Court erred in fact and in law when it held that the plaintiff was only entitled to RM4,800 per month from 16 October 2008 till 11 August 2012 against the second respondent only, not awarding mesne profits or double the rent of the parcel (RM9600) from 16 October 2008 till 1 August 2012 against all the defendants jointly and severally. Since the second to fourth defendants had taken possession of the said parcel from the first defendant since 16 October without the consent or notice of the plaintiff, they were all joint trespassers and thus, jointly and severally liable along with the first defendant in mesne profits. (paras 31 & 33)

Case(s) referred to:

Cheah Kim Tong &. Anor v. Taro Kaur [1989] 2 CLJ 791; [1989] 1 CLJ Rep 378 ***(refd)***

Dharni Dhar And Ors. v. Chandra Shekhar And Ors AIR 1951 All 774 ***(refd)***

Gracie Teo v. Tay Leng Hong & Ors [1987] 1 LNS 39 ***(refd)***

Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd & Another Appeal [1997] 3 CLJ 504 CA ***(refd)***

Joey Low Kok Joo v. AMG Insurance Bhd [2013] 1 CLJ 61 CA ***(refd)***

Maley v. Fearn [1946] 2 All ER 585 ***(refd)***

Mohamed Abu Bakar Yusof v. PA Syed Aboothahir P Ahmed [1990] 1 CLJ 112; [1990] 2 CLJ (Rep) 482 HC ***(refd)***

Natesan v. Goh Gok Hoon [1968] 1 LNS 86 FC ***(refd)***

Pelantar Agresif (M) Sdn Bhd v. Projek Lebuhraya Usahasama Bhd; Lembaga Lebuhraya Malaysia (Third Party) [2013] 6 CLJ 620 HC ***(refd)***
Petrie v. Lamont [1842] CAR Marsh 93 ***(refd)***
Supreme Finance (M) Berhad v. Koo Sin Ken [1987] 1 CLJ 374; [1987] CLJ Rep 349 SC ***(refd)***
Swordheath Properties Ltd v. Tabet and Others [1979] 1 All ER 240 ***(refd)***
Wee Tiang Yap v. Chan Chan Brothers [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 11, 28(4)(a)
Limitation Act 1953, s. 9(1)
Limitation Ordinance (Sarawak) (Cap 49), Schedule, art. 29
Rules of Court 2012, O. 42 r. 12, O. 59 r. 12

For the plaintiff - Henry Ling Kuong Meng; M/s Ling & Wong Advocs
For the 1st defendant - Jessie Wong Siew Wee; Nawi, Wong & Partner
For the 2nd & 3rd defendants - Kenny Yi; M/s Yi & Co Advocs
For the 4th defendant - Tony Ling Lee Tom; M/s HC Lee & Partners

Reported by Najib Tamby

JUDGMENT

Lee Heng Cheong J:

Introduction

[1] This is an appeal by the plaintiff in the court below against part of the decision of the Sessions Court given after trial on 25 September 2015. In the court below, the first, second, third and fourth respondents herein are also the first, second, third and fourth defendants respectively.

[2] The second defendant also appealed against the said decision of the Sessions Court to this court *vide* Civil Appeal No. BTU-12B-4/10-2015. For clarity and ease of reference, the parties hereto are referred to as their capacities in the Sessions Court in this ground of decision.

[3] The Sessions Court granted the judgment against the first defendant as follows:

(i) the arrears of rent under the said tenancy agreement from 1 June 2002 to 31 May 2007; and

(ii) the mesne profits from 1 June 2007 to 15 October 2007; but there was no award of mesne profits against the first defendant who parted the said parcel to other defendants from 16 October 2007 till 11 August 2012. The first defendant like the third and fourth defendants did not appeal or cross-appeal against the said decision of the Sessions Court.

[4] The Sessions Court also gave judgment against the second defendant only, ordering payment of rental of RM4,800 per month from 16 October 2008 till 11 August 2012.

[5] The plaintiff now appealed and prayed for mesne profits to be awarded against the first defendant from 1 June 2007 (not July 2007) to 15 October 2008, and also mesne profits against the first defendant jointly with all the other defendants since 16 October 2008 till 11 August 2012 with interest thereon and costs.

Undisputed Facts And Evidence

[6] The plaintiff is the registered proprietor of that strata title in Parcel No. 2723-1-2 comprised in that land and building described as Lot 2723 Bintulu Town District ("the said parcel"). He entered into a written tenancy agreement with his tenant, the first defendant, for a term of five years commencing from 1 June 2002 to 31 May 2007 at the agreed monthly rent in the sum of RM4,800 per month and upon the terms and conditions stated therein ("the said tenancy agreement").

[7] After the expiry of the said tenancy agreement, the first defendant still occupied the said parcel and then later without any consent or notice of the plaintiff, the first defendant assigned or sub-let the said parcel to the second defendant but operated by the third defendant doing the franchise business of the fourth defendant.

The First Defendant's Contentions

[8] The first defendant contended as follows:

(a) it is undisputed that the first defendant was no longer in possession of the said parcel after 16 October 2008;

(b) it is undisputed that the second defendant moved into the said parcel on 16 October 2008 and that the second defendant occupied the said parcel from 16 October 2008;

(c) the plaintiff has at no time objected at the material time to the first defendant handing over possession of the said premise to the second defendant.

(d) It is also contended that the Sessions Court was right in not awarding interest on the sum of RM288,000 other than from the date of the summons as at all material time, the plaintiff never approached the first defendant for the outstanding rental.

(e) that the first defendant was in fact willing to pay the rental to the plaintiff but was unable to locate the whereabouts of the plaintiff.

[9] The first defendant further contended as follows:

(a) the plaintiff should not be entitled to mesne profit from 16 October 2007 to 11 August 2012 as the first defendant was not in possession at that time and there was no instruction from the plaintiff not to hand over the possession to the second defendant. The first defendant further says that as the plaintiff was not contactable, the first defendant was in fact unable

to hand over the possession back to the plaintiff and that the plaintiff has also not shown that he has suffered any loss as the plaintiff never requested for the property to be handed back to the plaintiff upon the expiry of the said tenancy agreement;

(b) that the plaintiff should not be entitled to mesne profit from 16 October 2007 to 11 August 2012 as the first defendant was not in possession at that time and there was no instruction from the plaintiff not to hand over the possession to the second defendant. The first respondent further says that as the plaintiff was not contactable, the first respondent was in fact unable to hand over the possession back to the plaintiff and that the plaintiff has also not shown that he has suffered any loss as the plaintiff never requested for the property to be handed back to the plaintiff upon the expiry of the said tenancy agreement.

The Second And Third Defendants' Contentions

[10] The second and third defendants contended that the Sessions Court was correct in not awarding mesne profit against the second and third defendants as there was no formal landlord and tenant relationship between the plaintiff and the second defendant and that mesne profit depended on a landlord and tenant relationship.

[11] The second and third defendants further contended that the plaintiff's pleaded case is that the second and third defendants are trespassers. The Sessions Court ruled that the plaintiff's claim for trespass was time barred under art. 29 of the schedule of the Sarawak Limitation Ordinance (Cap 49) as it was not made within three years from the date of trespass. However the Sessions Court held that the plaintiff is entitled to claim rental from the second defendant as the second defendant had occupied the plaintiff premises and ran the "Sugarbun" business there for a number of years. The plaintiff's claim for trespass is already time barred as by art. 29 of the schedule of the Sarawak Limitation Ordinance (Cap 49) as the limitation period is three years from the date of the trespass.

[12] The plaintiff in his evidence-in-chief did not ask for interest. The plaintiff in his statement of claim (at pp. 1 to 15 of the record of appeal) in his prayer for relief also did not pray for interest. Since the plaintiff did not pray for interest it is only correct that the Sessions Court Judge did not award interest to the plaintiff.

The Fourth Defendant's Contentions

[13] The fourth defendant contended that the burden is the plaintiff to prove that he is entitled to the claim of mesne profit or double the rent of the said parcel against the fourth defendant and that the plaintiff has failed to prove so. In the instant case, there is no basis at all in the plaintiff's claim for mense profit or double the rent of the said parcel against the fourth defendant as there is never any agreement between the plaintiff and the fourth defendant in the first place, as correctly held by the Sessions Court. Further

A the Sessions Court was right in holding that the plaintiff's claim for double rental from the second defendant is unsustainable as double rental depends on a landlord and tenant relationship between the parties as provided under s. 28(4) of the Civil Law Act 1956.

[14] The fourth defendant also contended as follows:

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(a) that the Sessions Court was right in holding that the plaintiff's claim against the fourth defendant was clearly too remote as the said tenancy agreement for the premise was entered between the plaintiff and the first defendant and the fourth defendant had never agreed with the plaintiff to make good any rental shortfall owed by the first or second defendants.

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(b) That the plaintiff has only himself to blame for not collecting the rental from the first defendant promptly and instead leaving the rental uncollected for years and the plaintiff has not led any evidence as to why the fourth defendant should be blamed for his failure to collect the rental from the first respondent. The fourth defendant did not cause the defendants to fail to pay the rental.

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(c) In the present appeal, the fourth defendant was not even been informed by the plaintiff that there was rental outstanding by the first defendant at the material time or that the plaintiff no longer wished for the said parcel to be used as a fast food outlet.

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Consideration Of The Appeal

[15] This court finds that the plaintiff has proved on the balance of probability that the defendants and each of them had dispossessed, parted with the possession of, and/or in wrongful or illegal possession without consent or notice of the plaintiff (being the registered proprietor) in respect of the said parcel after the expiry of the said tenancy agreement.

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[16] The first defendant should not have parted with the possession of the said parcel on the part of the first defendant by selling, assignment or sub-letting to the second defendant as it is clearly in breach of the terms of the said tenancy agreement, and the second, third and fourth defendants ought to have ascertained that the first defendant has the requisite authority to sell before proceeding with the sale, assignment or sublet of the said parcel. Failure to do so will make their possession and occupation of the same, unlawful, wrongful or illegal.

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[17] The evidence adduced showed that the defendants and each of them were trespassers on the said parcel as they had dispossessed, parted with the possession of, and/or in wrongful or unauthorised occupation since the second, third and fourth defendants took over the said parcel from the first defendant (since 16 October 2008) without consent or notice of the plaintiff.

I

[18] The plaintiff being the registered proprietor of the said parcel, has indefeasible title which could not be rendered defeasible, by virtue of any wrongful selling, assignment or sub-letting of the said parcel by the first defendant, to the second defendant and other defendants.

[19] From the evidence adduced, it was clear that the first defendant had sublet the said parcel after the expiration of the fixed term of the said tenancy agreement to the other defendants, and such sub-letting was unlawful and contrary to the terms of the said tenancy agreement, and the relevant defendants have been in unauthorised possession and occupation throughout the material time.

[20] This court finds that the plaintiff is entitled to damages in the form of mesne profits and "assessed on the basis of the value of the premises at the relevant time, that is to say, at the time the judgment was pronounced in the court below" (see *Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd & Another Appeal* [1997] 3 CLJ 504, 518, per Abdul Malek Ahmad JCA) and *Swordheath Properties Ltd v. Tabet and Others* [1979] 1 All ER 240, CA).

[21] Clause 2(i) of the said tenancy agreement expressly stipulated that the first defendant agreed not to underlet the said parcel without the prior consent of the plaintiff. Since the first defendant was in breach of this express provision of the said tenancy agreement, the possession of the said parcel by the second, third and fourth defendants would make them, trespassers as their possession of the said parcel was unlawful thus the plaintiff is entitled to claim damages in the form of mesne profits. The defendants' unlawful possession of the said parcel was since 1 June 2007 and remained at all times unlawful as there was no tenancy agreement or contract between any of these defendants and the plaintiff thus mesne profits ought to be awarded against all the defendants, jointly and severally.

[22] In *Maley v. Fearn* [1946] 2 All ER 585, one of the terms of the tenancy of a dwelling house was that "the tenant must not sublet … without the written consent of the owner". The tenant, in breach of the tenancy agreement sublet a room in a house to the defendant without the consent of the owner. Morton LJ, held *inter alia* as follows:

> if a sub-letting is contrary to the terms of the tenancy, it may "*Where a person remains as a trespasser on residential property the owner is entitled to damages for the trespass without bringing evidence that he could or would have let the property to someone else if the trespasser had not been there." See headnote summary in Swordheath Properties Ltd v. Tabet and Others* [1979] 1 All ER 240, 240.
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> (emphasis added)

[23] It is trite that mesne profits are to be calculated based on the benefit or advantage that the person in unlawful occupation of immovable property enjoyed. The term 'mesne profits' relates to the damages or compensation recoverable from a person or trespasser who has been in wrongful possession of immovable property on the basis of the loss caused to the owner of the immovable property. Generally, the person in unauthorised or wrongful possession and enjoyment of the immovable property is liable for mesne profits. See s. 28(4)(a) of the Civil Law Act 1956; *Wee Tiang Yap v. Chan Chan Brothers* [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433; [1986] 1 MLJ 47; *Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd & Another Appeal* [1997] 3 CLJ

504; [1997] 3 MLJ 531; *Mohamed Abu Bakar Yusof v. PA Syed Aboothahir P Ahmed* [1990] 1 CLJ 112; [1990] 2 CLJ (Rep) 482; [1990] 1 MLJ 26; *Gracie Teo v. Tay Leng Hong & Ors* [1987] 1 LNS 39; [1987] 2 MLJ 435; *Natesan v. Goh Gok Hoon* [1968] 1 LNS 86; [1968] 2 MLJ 3.

[24] Section 28(4)(a) of the Civil Law Act 1956 states as follows:

> Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with **double the amount of his rent** until possession is given up by him or with **double** the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.
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> (emphasis added)

[25] In *Wee Tiang Yap v. Chan Chan Brothers* [1984] 1 CLJ 156; [1986] 1 MLJ 47, the owner claimed vacant possession of premises from the respondents previously the tenants of the premises but the owner issued a notice to quit to the respondents who become the trespassers after the expiry of the notice. The Federal Court held that the appellant was entitled to obtain damages for trespass in the form of double rent. Wan Sulaiman FJ considered s. 28(4)(a) of the Civil Law Act 1956 and held at p. 437 (CLJ); p. 49 (MLJ) as follows:

> In his prayer the appellant sought, *inter alia*, to claim damages for trespass to take the form of **double rent**. We note that the majority judgment was based on an English authority *Crook v. Whitbread* 88 LJ KB 959. Under section 1 of the English Landlord and Tenant Act, 1730 doing "wilfully" is a requirement. Our section does not contain that requirement.
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> However, on the facts of the case in the present appeal, even if a wilful act is required, the respondents had wilfully remained on the premises after expiry of the period of notice.
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> Accordingly, this appeal is allowed, in terms of the prayer set out in the amended Statement of Claim. The respondents are ordered to quit and deliver vacant possession of the premises within 3 months of the delivery of this judgment, and to pay **double rent** from March 1, 1976, from which date the notice to quit came into force. (emphasis added)

[26] In *Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd* [1997] 3 CLJ 504; [1997] 3 MLJ 531, one of the issues was whether the owner was entitled to claim for double rent and damages as a result of holding over after expiry of notice to quit. The Court of Appeal held that the appellants were entitled to double rental after the expiry of the tenancy. Abdul Malek Ahmad JCA (as he then was) held at p. 541 as follows:

> … the appellants are certainly entitled to **double rental** after the expiry of the tenancy. The damages asked for were only in the form of the reimbursement of the interest for the period the appellants were deprived of the possession of the premises and we held that since this was the direct result of the respondent's wrongdoing, the appellants were certainly entitled to claim them. (emphasis added)

[27] This court finds that the plaintiff has proved his loss and damages under the said tenancy agreement and the tort of trespasses against all the defendants and that the amount of damages, which is double rental claimed by the plaintiff, is not too remote to be recoverable.

[28] The plaintiff had also adduced evidence, to prove that the mesne profits of RM9,600 per month is reasonable as the prevailing market rate of rent at the said parcel at the time of the trial was RM5,500 per month. The Court of Appeal in the above quoted case of *Imbi World supra*, held *inter alia* at p. 518 (CLJ); p. 541 (MLJ) as follows:

> It was held in *Mohamed Abu Bakar s/o Yusof v. PA Syed Aboothahir s/o P Ahmed* [1990] 1 MLJ 26 that mesne profits are in the nature of damages for trespass and they are assessed on the basis of the value of the premises at the relevant time, that is to say, **at the time judgment was pronounced** in the court below. It was also held that the appropriate order to make was that the defendant be chargeable with **double the market rental value** of the premises from the date of expiry of the notice to quit to the date when possession was handed over to the plaintiff with the rider that the damages payable be limited to the jurisdiction of the particular court.
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> Over in Singapore, it has been ruled in *Gracie Teo v. Tay Leng Hong & Ors* [1987] 2 MLJ 435 that once there is **a holding over of the tenancy** of a property, the landlord is entitled to **double rent** until possession is given or **double** the value during the period of detention of the property. It is not a requirement that there should be a wilful holding over on the part of a tenant. (emphasis added)

[29] Further this court is guided by the case of *Natesan v. Goh Gok Hoon* [1968] 1 LNS 86; [1968] 2 MLJ 3 where the Federal Court held *inter alia* that the learned judge was right in his finding of fact that there was a prohibition against subletting in the tenancy agreement and that the learned judge was therefore right in ordering the payment of double rent against both the tenant and as sub-tenant and in the light of the provisions of s. 28(4) of the Civil Law Ordinance 1956, an order for payment of double rent can be made where an order for recovery of possession of the premises has been made against such tenant.

[30] Further guidance can be found in *Dharni Dhar And Ors. v. Chandra Shekhar And Ors* AIR 1951 All 774, where the court held at para. 25 as follows:

> I may refer to the case of *Sashi Kantha v. Promode Chandra* AIR (19) 1932 Cal. 600, decided by Mukerji and Guha, JJ. In this case, the Division Bench had occasion to consider the nature of the liability for mesne profits. At p. 617, it was observed:
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> > In the case of a claim for mesne profits two courses are left open to the Court. **A decree for mesne profits may be** passed jointly and severally against all the trespassers **who may have jointly kept the plaintiffs out of possession for any particular period, leaving**

> **them to have their respective rights adjusted in a separate suit for contribution.** Or the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed as against the respective trespassers in plaintiff's favour. (emphasis added)

[31] In the light of the above authorities and the evidence adduced, this court finds that the Sessions Court had erred in fact and in law when it held that the plaintiff was only entitled to RM4,800 per month from 16 October 2008 till 11 August 2012 against the second respondent only, not awarding mesne profits or double the rent of the said parcel (ie, RM9,600 per month) from 16 October 2008 till 11 August 2012 against all the defendants jointly and severally.

[32] The pleaded case of the plaintiff is that all the defendants were the parties jointly sued for the wrongful or illegal possession of the said parcel and each of them was equally responsible for the trespass to the said parcel without consent or notice of the plaintiff.

[33] Since the second, third and fourth defendants have taken possession of the said parcel from the first defendant since 16 October 2008 without consent or notice of the plaintiff, being the registered proprietor of the said parcel, they were all, joint trespassers and thus jointly and severally liable along with the first defendant in mesne profits. ("All persons in trespass who aid or counsel, direct or join, are joint trespassers": per Tindal CJ in *Petrie v. Lamont* [1842] CAR Marsh 93 at 96.

[34] In so far as the defendants' contention that the plaintiff's claim of trespass against the second and third defendants was time-barred by virtue of art. 29 of the Schedule of the Sarawak Limitation Ordinance (Cap 49), this court is in agreement with the plaintiff's contention that this particular defence of the second and third defendants was not pleaded and departed from the pleaded defence as the second and third defendants did not specifically plead it at all. Thus this court shall ignore it.

[35] Further as the second and third defendants were occupiers and trespassers of the said parcel and occupied the same until sometime in 2011, without the knowledge or notice of the plaintiff, this court thus finds that art. 29 of the Schedule of the Sarawak Limitation Ordinance is not applicable.

[36] In the present case, this court finds that the limitation would only start to run from 11 August 2012. Although the claims against all the defendants are only for damages, it is still not yet time-barred as when the writ filed in court on 6 June 2013, it is still outside the prescribed limitation period as the act of trespassing on the part of the second and third defendants had been continuing until 11 August 2012.

[37] This court is guided by the case of *Pelantar Agresif (M) Sdn Bhd v. Projek Lebuhraya Usahasama Bhd; Lembaga Lebuhraya, Malaysia (Third Party)* [2013] 6 CLJ 620 where Lau Bee Lan J, at p. 626A-B (para. 11) held as follows:

> Firstly, the Tort of Trespass is actionable *per se* and it is a continuing Trespass where successive actions will lie from day to day until the objects of Trespass are removed (*Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657; [2006] 6 MLJ 24 at pp. 33, 35).

[38] Further guidance can be found in *Cheah Kim Tong & Anor v. Taro Kaur* [1989] 2 CLJ 791; [1989] 1 CLJ Rep 378, which dealt with the issue of continuing trespass and that the plaintiff's action was barred by limitation of time, ie, s. 9(1) of the Limitation Act 1953. The said s. 9(1) provides as follows: "No action shall be brought by any person to recover land after the expiration of twelve years from the date on which the right of action accrued to him, or it first occurred to some person through whom he claims, to that person". The plaintiffs submitted that the trespass was a continuing one, and still continued. Peh Swee Chin J, (as he then was held) at p. 380d:

> I agree with the submission about the continuing trespass. In a continuing trespass a fresh cause of action arises di die in diem, ie, from day to day. This would alone dispose of the defendant's contention.

[39] This court finds that notwithstanding that there was no agreement or contract between the plaintiff and the third defendant in that the latter's name was merely being utilised for a licence food holder or the shop licence, the third defendant is nevertheless still liable for mesne profits as the third defendant was in fact the *de facto* operator of the said parcel, holding the shop licence issued by the Bintulu Development Authority to operate a franchise chain-restaurant "SugarBun" at the said parcel at Li Hua Plaza, and that the third defendant, being a joint tortfeasor, had trespassed on the said parcel and operated the business there for the second defendant without the consent or permission of the plaintiff.

[40] Notwithstanding that there was no contractual relationship between the plaintiff and the fourth defendant and that the fourth defendant was merely the franchisor of the brand "Sugarbun", this court finds that the fourth defendant was one of the joint tortfeasors, being in unlawful possession of the said parcel and the franchise business of Sugarbun was operated under a joint venture enterprise. The evidence adduced showed *inter alia* that the fourth defendant operated and managed the business operations of the "Sugarbun" at the said parcel. Thus the fourth defendant is liable to the plaintiff for trespass and mesne profits.

[41] On the issue of interest, this court finds that the Sessions Court erred in fact and in law in not awarding interest on the mesne profit or double the rent of such judgment sum from 16 October 2008 till 11 August 2012 against all the defendants jointly and severally.

[42] Order 42 r. 12 of the Rules of Court 2012 provides that "every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the court determines, such interest to be calculated from the date of judgment until the judgment is satisfied." See *Supreme Finance (M) Berhad v. Koo Sin Ken* [1987] 1 CLJ 374; [1987] CLJ Rep 349, SC.

[43] In *Joey Low Kok Joo v. AMG Insurance Bhd* [2013] 1 CLJ 61, the Court of Appeal held at p. 68 as follows:

> ... the court is of the view that this omission should not deprive the appellant of his interest. It is in the discretion of the court to grant interest and in any event it was held by Abdul Malek Ahmad FCJ in *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [2002] 4 CLJ 259 that interest should be awarded on costs although not specifically claimed.

[44] Section 11 of the Civil Law Act 1956 states as follows:

> 11. Power of Courts to award interest on debts and damages In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

[45] The prevailing interest rate is 5% per annum on the judgment debt under the Rules of Court 2012 and should be granted from the date of the writ till the date of the judgment date on the judgment sum pursuant to s. 11 of the Civil Law Act 1956 and again at the rate of 5% on the judgment debt from the date of the judgment date till the final settlement of the judgment debts against all the defendants jointly and severally.

[46] On the issue of costs, this court finds that Sessions Court erred in fact and in law in holding that costs to be taxed unless agreed, without determining which rule or principles of law governing the assessment or basis of costs involving different parties under O. 59 of the Rules of Court 2012.

[47] Order 59 r. 12 of the Rules of Court 2012 provides different basis for determination of costs and assessment of costs. By O. 59 r. 12 Rules of Court 2012 provides that costs may be directed to be assessed by the High Court in Form 117A but not by the subordinate courts. In other words, the Sessions Court ought to have decided on the issues of costs after hearing submissions from counsel.

Order

[48] In the light of this court's above findings, this court allows the appeal of the plaintiff in Civil Appeal No. BTU-12BNCvC-1/10-2015 and dismisses the appeal of the second defendant in Civil Appeal No. BTU-12B-4/10-2015) and orders as follows:

(i) that the appeal by the plaintiff in the Civil Appeal No. BTU-12BNCvC-1/10-2015 against those parts of the decision made by the Sessions Court, be and is hereby allowed with costs here and below;

(ii) that the appeal by the second defendant in Civil Appeal No. BTU-12B-4/10-2015 be and is hereby dismissed with costs;

(iii) that the first defendant do pay the plaintiff in Civil Appeal No. BTU-12BNCvC-1/10-2015, damages in the form of mesne profits at the rate of RM9,600.00 per month from 1 June 2007 to 15 October 2008 which is in the total sum of RM158,245.17;

(iv) that all the defendants do jointly and severally pay the plaintiff in Civil Appeal No. BTU-12BNCvC-1/10-2015 damages in the form of mesne profits at the rate of RM9,600 per month from 16 August 2008 until 11 August 2012 which is in the total sum of RM459,561.30;

(v) that the first defendant do pay the plaintiff in Civil Appeal No. BTU-12BNCvC-1/10-2015 interest at the rate of 5% per annum on the judgment sum of RM288,000 in the court below from 1 June 2007 till 15 October 2008 against the first defendant;

(vi) that the first defendant do pay the plaintiff in Civil Appeal No. BTU-12BNCvC-1/10-2015 interest at the rate of 5% per annum on the said damages of RM158,245.17 from 6 June 2013 the date of the writ till the date of full settlement;

(vii) that all the defendants do jointly and severally pay the plaintiff in Civil Appeal No. BTU-12BNCvC-1/10-2015 interest at the rate of 5% per annum on the said damages of RM459,561.30 from 6 June 2013 the date of the writ till the date of full settlement;

(viii) that costs of RM20,000 here and below be and is hereby awarded to the plaintiff in Civil Appeal No. BTU-12BNCvC-1/10-2015 against the first defendant;

(ix) that costs of RM40,000 here and below be and is hereby awarded to the plaintiff against the second and third defendants jointly and severally in Civil Appeal No. BTU-12BNCvC-1/10-2015 and Civil Appeal No. BTU-12B-4/10-2015; and

(x) that costs of RM15,000 here and below be and is hereby awarded to the plaintiff in Civil Appeal No. BTU-12BNCvC-1/10-2015 against the fourth defendant.